Supreme Court
(1) F I L E D
25-102 JUN 5 1995

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1994

ALMA TORREBLANCA DE AGUILAR, ET AL.,
Petitioners,

v.

THE BOEING COMPANY, ET AL.,
Respondent.

Petition For Writ of Certiorari

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Petitioners

QUESTIONS PRESENTED

The petitioners, who are representatives of estates of decedents who were killed in an air crash in Mexico, brought suit in the state court of Texas on behalf of the estates and, in their petition filed in the state court, expressly alleged that they did not, and would not, seek any recovery greater than $50,000.00 per decedents' estate, exclusive of costs and interest. They attached to their state court pleadings the affidavit of one of their lawyers in which the lawyer, on behalf of the petitioners, stipulated that the petitioners were irrevocably waiving any and all rights to claim damages in excess of $50,000.00 per estate and agreeing that such stipulation constituted an irrevocable judicial admission and

limitation upon the amount of recovery. The petitioners also filed, after removal, the affidavit of a Mexican lawyer, who, as also one of the petitioners' counsel swore that the named representatives in the state court petition had, under Mexican law, the authority to represent the estates in question and to bind them to the stated limitations upon their recoveries. The defendants removed to federal court; the federal district court denied petitioners' motion to remand; and the court then dismissed petitioners' suit on ground of forum non conveniens. The Fifth Circuit Court of Appeals affirmed and held that a removing party has a right to assert federal removal jurisdiction despite the presence of express pleadings, affidavits and

stipulations limiting the amount of recovery to less than the jurisdictional minimum.

The above situation presents one overall question, with subsidiary parts, for review: Did the holding in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586 (1938) - that "(i)f (a plaintiff) does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove" - permit the federal court to collaterally attack the pleadings, stipulations and affidavits in this case; to attack the authority of the attorneys and representatives of the various estates to make binding stipulations as to the

amount of the suit; and to grant federal removal jurisdiction based simply upon the contention that the petitioners claims were really worth more than $50,000 each and petitioners did not have the right to waive any portion of their actual claims in order to have their cases disposed of in the state court system.

The holding of the Fifth Circuit in this case is in conflict with the decision of the Tenth Circuit in *Laughlin v. K-Mart Corporation*, 50 F. 3d 871 (10th Cir. 1995) and numerous other decisions of other circuit and district courts (it is petitioners understanding that counsel for K-Mart, the losing party in the *Laughlin* case, is going to file a petition for writ of certiorari by the end of July, 1995 and such case will be

very much "related" to this case and the issues to be decided in both).

Therefore, we respectfully submit that the importance of the issue presented, relating as it does to federalism, comity, removal/remand law, and other extremely important areas of American law, and the need for uniformity with respect to the decisions of the courts of appeals and district courts, make the grant of the petition for writ of certiorari in this case imperative.

LIST OF PARTIES

Petitioners/Appellants/Defendants

Benton Musslewhite
Mitchell Toups
Dennis C. Reich
Alma Torreblanca de Aguilar and All of the Plaintiffs Listed on App. 4.

Respondents/Appellees/Plaintiffs

The Boeing Company

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Goodyear Tire & Rubber Company

Gerald L. Bracht
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EASTHAM, WATSON, DALE & FORNEY
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808 Travis
Houston, TX 77002-0769

Parker Hannifin Corporation

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THE BOEING COMPANY
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Petition For Writ of Certiorari
To United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Alma Torreblanca de Aguilar, et al, file this petition and brief to urge the Court to grant certiorari and review the question presented, and would show this Honorable Court as follows:

OPINIONS BELOW

A. The opinion of the U.S. Circuit Court of Appeals for the Fifth Circuit, concerning which Writ of Certiorari is sought in this case, can be found at 47 F.2d 1404 (5th Cir. March 7, 1995) and is reproduced as Appendix C, A30 to A77.

B. The opinion of the federal district court, denying petitioners motion to remand, is reproduced as Appendix A, A1 - A27.

C. The opinion of the federal district court, dismissing this case on ground of forum non conveniens, is reproduced as Appendix B, A28 to A29.

JURISDICTION

The Court has jurisdiction to review a final judgment of a court of appeals pursuant to 28 U.S. C. § 1254 (1). The final judgment of the court of appeals

was entered on March 7, 1995. No petition for rehearing was filed.

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves 28 U.S.C. Section 1332 providing for removal in diversity cases from state court to federal court if the amount in controversy exceeds $50,000.00 exclusive of costs and interest. This statute has been reproduced and is attached as Appendix F, A126 - A128.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On March 31, 1986, a Mexicana Airlines jet crashed near Mexico City, killing everyone on board. An investigation concluded that a tire exploded in the wheel well while the plane was in flight, causing an in-flight fire that eventually caused the plane to explode.

Relatives and personal representatives of the estates of those who died in that crash filed several lawsuits throughout the United States and in Mexico. In every lawsuit filed in the United States, the action has been either voluntarily dismissed by the petitioners or dismissed by the federal courts on the basis of foreign sovereign immunity or forum non conveniens.[1]

In November 1992, petitioners, as the personal representatives of the estates of each decedent and the legal heirs of the decedents, filed an action

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[1] See de Aguilar, v. Boeing Co., 11 F.3d 55 (5th Cir. 1993); Compania Mexicana de aviacion, S.A. v. United States Dist. Court, 859 F.2d 1354 (9th Cir. 1988); Rodriquez v. Mexicana de Avion, S.A., (W.D. Tex. 1987), aff'd mem., 843 F.2d 498 (5th Cir.), cert. denied, 488 U.S. 826 (1988); Wolf v. Boeing Co., 810 P. 2d 943 (Wash. App.), review denied, 818 P.2d 1098 (Wash. 1991).

in the Texas state court seeking wrongful death and survival damages. The petitioners charged state-law negligence and products liability against Boeing, B.F. Goodrich, Goodyear Tire & Rubber, Delta Airlines and Parker Hannifin Corporation. The amount of damages were not specified because, under the Texas rules, theoretically the petitioners could only allege that "the damages sought are within the jurisdictional limit of the court." See Tex. R. Civ. P. 47.

After defendants removed the case to federal court in the Eastern District of Texas, petitioners filed affidavits executed by certain petitioners and by the petitioners' attorneys, expressly limiting the damages they were seeking, and moved to remand on the ground that

the $50,000 jurisdictional amount requirement of 28 U.S.C. Sect. 1332 was not satisfied. The district court denied remand, holding that the affidavits were irrelevant because "jurisdiction attaches at the time of removal, and subsequent events do not oust the court of jurisdiction." *de Aguilar v. Boeing Co.*, 790 F. Supp. 693, 694 (E.D. Tex. 1992). Subsequently, however, the Fifth Circuit decided *Asociacion Nacional de Pescadores v. Dow Quimica de Colombia S.A.*, 988 F. 2d 559 (5th Cir. 1993), cert. denied, 114 S. Ct. 685 (1994) ("ANPAC"), concluding that post-removal affidavits sometimes can be relevant where the jurisdictional amount question is unresolved. Id. at 565.

The district court in the first *de Aguilar* case further noted that, even if

it had considered the affidavits relevant, the complaint named one hundred unknown petitioners who were not bound by the affidavits, and petitioners' counsel could not bind minor beneficiaries (constituting approximately twenty of the named plaintiffs) to judgments in wrongful death suits without leave of court. *de Aguilar*, 790 F. Supp. at 695. The claims later were dismissed on forum non conveniens grounds. *de Aguilar v. Boeing Co.*, 806 F. Supp. 139 (E.D. Tex. 1992). The court held that direct estoppel barred the plaintiffs from re-litigating the forum non conveniens dismissal. Courts in Illinois, Washington and the Western District of Texas had already ruled on the question of forum non conveniens. Id. at 142. The court also found that, under

traditional forum non conveniens criteria, Mexico would be a more convenient forum. Id. at 142-143.

The Fifth Circuit affirmed the denial of the motion to remand and the dismissal on estoppel and forum non conveniens ground. *de Aguilar v. Boeing Co.*, 11 F.3d 55 (5th Cir. 1993) ("de Aguilar I"). The Fifth Circuit held that the district court had properly disregarded the affidavits because it was "facially apparent" that the damages sought by each plaintiff really exceeded $50,000. Id. at 57. Alternatively, the court noted that the attorney affidavits were not unrebutted by evidence from the defendants. Id. at 57-58. The Fifth Circuit concluded that these points distinguished *de Aguilar I* from ANPAC.

ANPAC, the Fifth Circuit contends in

de Aguilar I, involved claims that were not facially likely to exceed the jurisdictional amount. *ANPAC*, 988 F.2d at 565. In addition, the Fifth Circuit agreed in *de Aguilar I* that, in *ANPAC*, the only "evidence" the defendants produced to rebut the plaintiffs' attorneys' affidavits was the original notice of removal, which merely stated that the matter in controversy exceeded $50,000. Id. The *de Aguilar I* court noted that the defendants in that case had produced testimonial evidence and published precedent suggesting that the matter in controversy exceeded $50,000. *de Aguilar I*, 11 F. 3d at 58.

Shortly after the district court dismissed the de Aguilar claims, petitioners' attorneys filed another petition in state court in Beaumont,

Texas ("de Aguilar II"). See App. D., A78 to A107. In that petition, the pleading at issue now, the petitioners sought only survival damages, dropped forty-two of the heirs, including all of the minors, and dropped any mention of unnamed "Doe" plaintiffs. More importantly, each petitioner sought no more than $50,000.00 and expressly stated in the original state court petition that the amount of his or her claim did not exceed $50,000. Petitioner attached to the original petition an affidavit of attorney Dennis Reich, stating that plaintiffs stipulated and agreed to an irrevocable cap of $50,000 on the amount of damages that could be awarded.[2]

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[2] The state court petition stated in part: "As a direct and proximate result of the negligent acts,...and

conditions created by Defendants... decedents suffered the following damages:

1) The above-named decedents, during the flight of the subject aircraft leading up to the crash, suffered mental anguish due to fear of death, mental anguish and pain and suffering, the value of which will not exceed $50,000 per decedent.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendants be cited to appear and answer, and on final trial, Plaintiffs have:

1) Judgment against Defendants for a sum not to exceed $50,000 per decedent exclusive of interest and court costs;....

Plaintiffs further attach an affidavit of Dennis Reich clearly stating that each decedent's damages are within the jurisdictional amounts of the County Court at Law of Jefferson County, Texas and that each decedent's damages do not exceed $50,000 exclusive of interest and court costs. Dennis Reich's affidavit is attached hereto as Exhibit A and incorporated herein as if set forth herein." See App. D, A102, A103.

Dennis Reich's stipulation attached to the original petition stated in part: "I am the attorney for each Plaintiff identified in the preceding Petition. I

Defendants once again removed the *de Aguilar* case to federal court in the Eastern District of Texas, contending in their notice of removal that the amount in controversy actually exceeded $50,000.

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hereby judicially admit that each claim on behalf of each decedent I represent as a result of the crash of the Boeing 727-S64, Mexicana Airlines, Flight 944, is less than fifty thousand dollars ($50,000.00) exclusive of interest and court cost. Each decedent hereby irrevocably agrees that the amount of damages claimed on their behalf in this action will forever be less than fifty thousand dollars ($50,000.00) exclusive of interest and court costs. Plaintiffs hereby irrevocably agree to the entry of an order of court which places an irrevocable cap upon the amount of damages which may be sought by or awarded to Plaintiffs in this case. This cap should be set at fifty thousand dollars ($50,000.00) exclusive of interest and court costs.

Plaintiff agree, acknowledge, and understand that this stipulation is binding upon them and cannot be rescinded or revoked under any circumstances regardless of any developments which may occur during the investigation, discovery, pretrial or trial of this action." See App. D, A105 to A106.

See App. E, A102 to A120.[3] After removal, plaintiffs filed a supplemental motion to remand for lack of jurisdiction and attached an affidavit from a Mexican lawyer, Guadalupe Bistrain, who was one of the plaintiffs' attorneys. Ms. Bistrain swore that she had received explicit authority from each of the named plaintiffs to limit damages to $50,000 per estate. App. F., A121 to A122.

The district court determined that the plaintiffs had not shown the

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[3] The removal papers essentially contended that, under Texas state law, neither plaintiffs nor their attorneys could bind the decedents estates. See App. E., A111-A117. The affidavit of Howard Close, claiming that one of the counsel for plaintiffs, Mitchell Toups, admitted that he did not know if the representatives of the estates had authority to bind the plaintiffs was completely rebutted by the affidavit of Mr. Toups and Ms. Bistrain. See App. F, A121 to A122; A123 to A124. In any event, the Fifth Circuit did not base its decision on the affidavit of Close.

necessary authority to limit damages and ruled that the amount in controversy exceeded $50,000.[4] App. A., A 1 - A 27. The district court denied the petitioners' motion to remand, primarily on the ground that the stipulation of the petitioners' attorneys and the limiting allegations in the state court petition were not enough to deprive the federal court of jurisdiction. The district court held in effect that the burden was

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[4] Defendants alleged an additional basis for federal jurisdiction. In December 1992, Boeing filed a third party complaint against Mexicana Airlines, which, on January 15, 1993, filed a memorandum that claimed status as a "foreign state" under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611. Petitioners filed a motion to strike or, in the alternative, sever Boeing's third party claim. The district court denied this motion when it denied the motion to remand. Since the Fifth Circuit did not reach this issue, it does not play any role in this Petition for Writ of Certiorari.

not upon the removing party but upon the removed party and that the petitioners had not satisfied that burden. Id.

The district court also denied the forum non conveniens motion, adopting the decision of the district court on that issue in *de Aguilar I* 806 F. Supp at 139; See App. C, A28-A29.[5]

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[5] The petitioners do not question that forum nor conveniens decision under federal forum no conveniens law in this petition for writ certiorari. By conceding this, however, we no not waive any right to contend in state court - if the Court orders this case remanded to state court, as we urgently contend that it should - that, under Texas forum non conveniens law, the case should not be dismissed on forum non conveniens grounds. This is one issue that has never been actually litigated. See Chick Kam Choo v. Exxon, 108 S. Ct. 1684, 1690 (1988). Under Texas law prevailing at the time of the filing of de Aguilar II, the Texas court had no discretion to dismiss on forum non conveniens ground. See Sect. 71.031 of the Texas Civil Practices and Remedies Code and Dow Chemical Co. v. Alforo 786 S.W. 2d 674 (Tex. 1990), cert. den. 498 U.S. 1024 (1991). Texas has recently

The Fifth Circuit affirmed in all respects. See *de Aguilar v. Boeing*, 47 F. 3d 1404 (5th Cir. 1994) and App. C, A30 to A77. After conceding that the petitioners had alleged a specific amount of damages less than the jurisdictional minimum of $50,000 for each decedent, the Fifth Circuit proceeded to grossly misinterpret this Court's decision in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 58 S. Ct. 586 (1938)("Red Cab"). In a remarkable process of rationalizations, the Fifth Circuit effectively shifted the burden to the removed party by imposing voluminous requirements the removed party must

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passed a law that reduces the impact of Alfaro but that law does not affect de Aguilar II since it was filed prior to September 1, 1993, see Sect. 71.051 of the Texas Civil Practices and Remedies Code.

satisfy that were not imposed by *Red Cab*;[6] held that even though plaintiffs voluntarily and expressly limited their recoveries in their state court pleading to an amount less than the federal jurisdictional minimum, such pleading is still subject to the bad faith test upon removal to federal court; and, in a

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[6] These are discussed in detail infra. The removed party must show:

1) that state law permits pleading a limitation;

2) that a stipulation of limitation is effective under state law;

3) that removed party's attorneys have complete authority to make such pleading;

4) that, in death cases, the removed parties are the judicially appointed legal representatives of the estates involved; and

5) that, even though the law of the removed party's domicile allows heirs to represent the estates, if the law of the venue state does not allow the heirs to represent the estate, then, even though the courts throughout the litigation have applied the law of the estates' domicile, the court will apply the law that enlarges federal jurisdiction - in this case Texas state law.

rather shocking display of an appetite for federal jurisdiction, the Fifth Circuit applied Texas law, not federal procedural law or Mexican law, on the question of whether the heirs could bind the estates to a limitation upon the claims, even though previous federal courts considering this litigation, at the request of the removing party had consistently held that Mexican law, not Texas or any American law, applies in this case. See e.g. *Wolf*, 810 P. 2d. at 948, 949; *de Aguilar I*, 806 F. Supp at 142.[7]

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[7] The federal district court in de Aguilar I, at the request of Boeing, held that the law of Mexico applied, stating that "Mexico...has the paramount interest in this lawsuit". 806 F. Supp. at 142. The Fifth Circuit preached the gospel of "law of the case" with respect to the forum non conveniens determination, see footnote 5, App. C A41, but refused to apply it to the finding of the applicability of Mexican law, which is really a subsidiary element in the forum non conveniens

In sum, the Fifth Circuit completely ignored this mandate of the Court in *Red Cab*;

> "If he (Plaintiff) does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove."

303 U.S. at 294, 58 S.Ct. at 593.

REASONS FOR GRANTING WRIT

A. The Red Cab Decision of This Court.

Any analysis of the question of whether a diversity claim satisfies the minimum federal jurisdictional amount prescribed by Congress (now $50,000), must begin with *Red Cab*.

In *Red Cab*, plaintiff filed a diversity suit against defendant alleging breach of an insurance contract. The state court complaint alleged $4,000 in

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analysis.

damages. Defendant removed the case to federal court. Thereafter, plaintiff amended its complaint and, while still stating the damages to be $4,000, attached an exhibit which itemized the damages and showed them actually to total only $1,380.90. Judgment was entered by the federal district court for the plaintiff in the amount of $1,162.98. Upon appeal, the court of appeals sua sponte ordered the case remanded to state court on the ground that the federal courts had no subject matter jurisdiction because the amount in controversy was less than $3,000.00 (the minimum jurisdictional amount at the time).

This Court granted writ of certiorari. The Court first addressed the non-removal situation, where a case is filed originally in the federal court

and the issue is whether the plaintiff is trying to boot-strap himself (by himself or in collusion with the defendant) into federal court when the amount in controversy is really less than the minimum jurisdictional amount. The Court stated:

> "The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts. The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim. But if, from the face of the pleadings, it is apparent to a legal certainty that the plaintiff cannot recover the

> amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover the amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed. Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction."

58 S.Ct. at pp. 590, 591.

Having said the foregoing, the Court then addressed the removal situation, explaining the significant differences between how the amount in controversy question is treated when the case is originally filed in federal court and when the case is filed in state court and thence removed to federal court:

> "In a cause instituted in the federal court the plaintiff chooses his forum. He knows or should know whether his claim is within the statutory requirement as to amount. This good faith in choosing the federal forum is open to challenge not only by resort to the face of his complaint, but by the facts

disclosed at trial, and if from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction there is no injustice in dismissing the suit. Indeed, this is the court's duty under the Act of 1975. In such original actions it may also well be that plaintiff and defendant have colluded to confer jurisdiction by the method of the one claiming a fictitious amount and the other failing to deny the veracity of the averment of that amount in controversy. Upon disclosure of that state of facts the court should dismiss.

A different situation is presented in the case of a suit instituted in a state court and thence removed. There is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court or that the parties have colluded to that end. For if such were the purpose suit would not have been instituted in the first instance in the state but in the federal court. It is highly unlikely that the parties would pursue this roundabout and troublesome method to get into the federal court by removal when by the same device the suit could be instituted in that court. Moreover, the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a

> removal, since the defendant must file his petition before the time for answer or forever lose his right to remove. Of course, if, on the face of the complaint, it is obvious that the suit cannot involve the necessary amount, removal will be futile and remand will follow."

58 S.Ct. at p. 591, 592; emphasis ours.

The Court then disclosed how it reached its conclusion that the court of appeals erred in ordering remand:

> "And though, as here, the plaintiff after removal, by stipulation, by affidavit, or by amendment of his pleadings, reduces the claim below the requisite amount, this does not deprive the district court of jurisdiction.
>
> Thus events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiffs control or the result of his volition, do not oust the district court's jurisdiction once it has attached."

Then the Court announced the rule that absolutely applies to, and controls, this case:

> "The claim, whether well or ill

> founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election. If he does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove."

58 S.Ct. at p. 593; emphasis ours.

The foregoing statement is simple and plain enough. To us, it says that if the plaintiff chooses to sue in state court for an amount that is less than the minimum for federal court jurisdiction, "the defendant cannot remove" even though the plaintiff could have justly sued for more. All of the discussion by the Court in *Red Cab* about "good faith" or "bad faith" or "legal certainty", clearly pertained only to the non-removal situation, not the removal-remand

situation.[8]

Yet, it is amazing how the federal courts have extrapolated that reasoning over into the removal-remand situation. It is ever more amazing how so much

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[8] The underlying rationale for the difference in treatment is perhaps best expressed in *Shamrock Oil & Gas Corporation v. Sheets* 61 S.Ct. 868, 872 (1941):

> "Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'"

confusion and conflict among the federal courts have arisen out of what is so clear and concise a statement of the law. But arise it has! The confusion and conflict in this area of the law is perhaps more severe than in almost any other.

A good discussion, and example, of how the federal courts have drifted, diverted and gone astray can be found in *Garza v. Bettcher Industries*, 752 F. Supp. 753 (E.D. Mich, 1990). The *Garza* court discusses how some courts have even gone so far as to hold that, if the defendant alleges "a factual basis for federal jurisdiction", the "burden would then shift to plaintiff to prove to a legal certainty that the federal jurisdictional amount is not satisfied." 752 F. Supp. at 757, 758; *Kennard v.*

Harris Corp. Inc., 736 F. Supp. 453, 454 (E.D. Mich, 1989); and *Partlow v. Jones Motors. Inc.*, 736 F. Supp. 744, 746 (E.D. Mich 1990). While the *Garza* court rejected the reasoning in *Kennard* and *Partlow,* it nevertheless also misconstrued *Red Cab* and finally concluded that the appropriate test is that the "Defendant (need only) allege facts sufficient to establish that the Plaintiff would more likely than not recover more than the jurisdictional amount." 752 F. Supp. at 763.

We have mentioned *Garza* because it has, to a great extent, presaged the Fifth Circuit decision in this case.

B. Fifth Circuit Law and Its Holdings In this Case and Their Conflict with *Red Cab*.

There are four cases, including the decision in this case, that illustrate

how the Fifth Circuit has veered off to the extreme edge of the range of decisions dealing with the amount in controversy issue. The Fifth Circuit has enunciated rules that are directly contrary to this Court's *Red Cab* decision and are in direct conflict with decisions in other circuits and federal district courts.

The first of those four cases is *Kliebert v. Upjohn Co.*, 915 F. 2d 142, 147 (5th Cir. 1990), vacated for reh'g en banc, 923 F. 2d 47 (5th Cir.), appeal dism'd per stipulation of settlement, 947 F.2d 736 (5th Cir. 1991) ("Kliebert"). In *Kliebert*, plaintiffs alleged a specific dollar amount of damages that was less than the federal minimum jurisdictional amount. The defendants removed and the Panel of the Fifth

Circuit held that the case should have been remanded. However, the Panel still imposed a restriction upon the removed party that was not permitted, we respectfully submit, by *Red Cab*.

First, the Panel erroneously cited the "legal certainty" and "good faith" doctrines in relying upon *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 353, 81 S.Ct. 1570, 1573 (1961) which was a non-removal case (originally filed in the federal court), rather than a removal case like *Red Cab* and this case. See discussion, 915 F. 2d at 145. Then it discussed the various alternative burdens which different courts have utilized. 915 F. 2d at 146.[9] Eventually,

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[9] What it and so many courts have done is to cite *Red Cab* for the proposition that, in a removal-remand situation, in order to remove "a state court suit originally seeking damages

the Court in *Kliebert* adopted a fairly reasonable approach. It was an approach that was still erroneous and which still disobeyed *Red Cab*. But it was better than most other approaches taken by the lower federal courts. The *Kliebert* court

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below the federal jurisdiction amount, the defendant has the burden of establishing that the plaintiff acted in bad faith in understating his claim." 915 F.2d at 146. To the contrary, *Red Cab* does not, we submit, permit the federal court to examine the motives of the plaintiff in filing suit in state court; if the claim is for less than the jurisdictional amount, then ipso facto the defendant cannot remove, even if the claim could have been brought for a lot more. The court in *Kliebert* then discussed a number of cases that hold that the defendant "has the burden of proving that it does not appear to a legal certainty that the claim is actually for less than the requisite jurisdictional amount," 915 F. 2d at 146, and other cases that reject the foregoing "double negative" approach and hold that "to establish the jurisdictional amount it is sufficient (for the removing defendant to show) that there is a probability that the value of the matter in controversy exceeds the jurisdictional amount." *Id.*

held that the plaintiff's state court pleadings of an amount below the federal jurisdictional level could be attacked on the basis of "bad faith", but held that, in order to do so, "the trial court must be able to conclude from the pleadings or, at the most, summary judgment-type evidence, that if the jury awarded less than $10,000.00, the court would be required to grant a new trial." Id. at 146.

The Fifth Circuit, in *de Aguilar I*, was dealing with a situation where the plaintiffs had not alleged a specific amount below the jurisdictional limit. The Fifth Circuit limited the effect of *ANPAC*, supra, and held that "(w)hen the Plaintiff's complaint does not allege a specific amount of damages, the removing defendant must prove by (nothing more

than) a preponderance of the evidence that the amount in controversy exceeds $50,000.00." 11 F.3d at 58.

Then came this case, *de Aguilar II*. Again, the Fifth Circuit completely disregarded this Court's clear language in *Red Cab*. It set about discussing the various theories, suggested tests and approaches and erroneously drew upon the Court's language - "legal certainty" and "good faith" - which were, as we noted above, intended as guidelines only in the situation where the plaintiff initially files suit in the federal, rather than the state, court and a question arises as to whether the suit is really for an amount in excess of the minimum jurisdiction of the federal courts. See App. C, A44 to A63, particularly A59 to A63; 47 F. 3d at 1409 to 1412.

In further discussing its position, the Fifth Circuit took another step away from traditional concepts of federalism, states rights, comity and removal/remand laws; effectively repudiated *Kliebert*, noting that, since the Panel decision in *Kliebert* was vacated because of a settlement, "Kliebert is no longer precedent in this Court. . .."; and then expressly rejected the principles announced in *Kliebert*:

> "The onerous nature of this burden (adopted in *Kliebert*) stands in direct contrast to the analysis of several district courts that have stated the removal inquiry as a type of '<u>converse legal certainty test</u>.' Under this formulation, defendant 'has the burden of proving that it does not appear to a legal certainty that the claim is actually for less than the requisite amount.' *Hale*, 610 F. Supp. at 164. Courts elsewhere have restated the test and required that the defendant show 'that there is a probability that the value of the matter in controversy' exceeds the jurisdictional amount.....

> As the dissenting judge indicated in *Kliebert*, the strict test adopted by the *Kliebert* majority "seems to conflict with our past decisions that have stated that the standard for determining jurisdictional amount should favor 'those parties seeking to invoke the jurisdiction of the federal district court.' *Kliebert*, 915 F. 2d at 148 (Jolly, J., dissenting) (quoting *Opelika Nursing Home v. Richardson*, 448 F. 2d 658, 663 (5th Cir. 1971).
>
> The *Kliebert* standard also fails adequately to protect defendants from plaintiffs who seek to manipulate their state pleadings to avoid federal court while retaining the possibility of recovering greater damages in state court following remand. This court has spoken adamantly of preventing the plaintiff from being able to destroy the jurisdictional choice that Congress intended to afford a defendant in the removal statute." *Boelens*, 759 F. 2d at 507.

See App. C, A57 to A59; 47 F. 3d at 1411.

The Fifth Circuit then proceeded to impose all sorts of limitations upon the simple, easy-to-apply and clearly understandable language employed in *Red Cab*. First, even where plaintiffs have

expressly limited their damages to less than the minimum jurisdictional amount, the Fifth Circuit held that defendants can sustain removal under the following approach:

> "Consequently, the plaintiff's claim remains presumptively correct unless the defendant can show by a preponderance of the evidence that the amount in controversy is greater than the jurisdictional amount....
>
> So, once a defendant is able to show that the amount in controversy exceeds the jurisdictional amount, removal is proper, provided plaintiff has not shown that it is legally certain that his recovery will not exceed the amount stated in the state complaint. Thus, once the defendant has pointed to an adequate jurisdictional amount, the situation becomes analogous to the 'typical' circumstances in which the *St. Paul Mercury* 'legal certainty' test is applicable: The defendant has established, by a preponderance, that the federal jurisdiction is warranted. At this point, '[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.' *St. Paul Mercury*, 303 U.S. at 289,

App. C, A59 to A60; 47 F.3d at 1412.

Again, it is clear that the Fifth Circuit has, in an unnecessarily confusing fashion, extrapolated the language applicable to non-removal situations and applied it to removal situations even where the plaintiffs have expressly limited their state court suit to less than the jurisdictional amount.

Second, the Fifth Circuit held that, even where plaintiffs expressly limit their claims to less than the jurisdictional amount, they should expressly point out a state law, if one exists, "that prohibits recovery of damages that exceed those requested in the *ad damnum* clause and that prohibits the initial *ad damnum* to be increased by amendment" and, if such a law does not exist, plaintiffs "who want to prevent

removal must file a binding stipulation or affidavit with their complaints. . ." App. C, A63 to A65; 47 F.3d at 1412, citing *In Re Shell Co.*, 970 F.2d 355, 356 (7th Cir. 1992) (per curiam).

Third, the Fifth Circuit in this case held that, because the petitioners had sought damages in prior proceedings far in excess of the minimum jurisdiction of the federal court, it was "facially apparent that the amount in controversy exceeds $50,000.00." App. C., p. A64, A65; 47 Fed. 3d at 1413. This conclusion was erroneous and did not, of course, take into consideration the fact that respondents in this case had offered nothing in settlement and had done nothing but have each of the prior cases dismissed on federal forum non conveniens grounds, thus rendering the cases worth

only what they are worth in Mexico, which is about $10,000.00 per claim, an amount far below the minimum jurisdictional requirement of the federal courts. In other words, the Fifth Circuit's interpretation of what is "facially apparent" is a one-way street interpretation and does not take into consideration the practical realities of a case's value.

Fourth, even though the petitioners in this case had attached to their initial state court pleading the affidavit suggested in *In Re Shell* and by the Fifth Circuit in de Aguilar II (see discussion above), the irrepressible Fifth Circuit then held that the question of whether the lawyers and/or heirs had the right to bind the petitioners to such an affidavit and stipulation (to the

effect that petitioners would not ever seek to recover more than $50,000.00), would be determined under Texas law (which the court then proceeded to misconstrue).[10]

With respect to the question of whether the right to remand can be encumbered by an attack on the lawyer's authority, the Fifth Circuit continues to misconstrue *Red Cab*. In *Red Cab*, this Court expressly held that the plaintiffs

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[10] See *Johnson v. Holly Farms of Texas, Inc.*, 731 S.W. 2D 641, 647 (Tex. App.--Amarillo, 1987), holding that lawyers and heirs are not required to prove their authority with respect to the right to represent an estate unless "challenged by a plea in abatement or verified denial." In this case, even if Texas law applies, which it does not, since the respondents never filed the necessary papers to place representation in issue (a plea in abatement or verified denial), as required by Texas law, the Fifth Circuit was wrong in holding that this was the way for the court to assert removal jurisdiction.

could avoid federal jurisdiction by the simple "expedient" of suing in the state court for an amount less than the minimum jurisdictional requirement of the federal courts. This Court did not say that such allegations in the state court complaint could be collaterally attacked and that the plaintiffs would still have to overcome all of the hurdles of a virtual trial on the merits in order to finally get the right to remand.

Furthermore, in holding that Texas law applied to the question of whether the pleadings and stipulations could bind the estates, the Fifth Circuit disregarded its own precedent with regard to jurisdictions, such as Texas, that utilize, for conflicts-of-law purposes, the "most significant relationship

test".[11]

See *In Re Air Crash Disaster Near New Orleans, LA,* 821 F.2d 1147 (5th Cir. 1987). In that case, the en banc court of appeals held that, under the most significant relationship test, Uruguay had a more significant relationship to the question of damages concerning the death of a Uruguay citizen, than did Louisiana, even though the crash occurred in Louisiana. See 821 F. 2d at 1170. The Court stated:

> "The laws of the two involved forums are certainly in conflict - Uruguay allows recovery, Louisiana does not- but this observation does not by itself answer whether a true conflict exists. We must also look to the interests of the two states

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[11] At least the Fifth Circuit conceded that the question of which law applies to the authority of heirs to represent the estates "is not a procedural issue; otherwise, the federal procedural rules would apply." See A77, ftn. 12, App. C.; 47 F.2d at 1414.

> involved. Uruguay's interest in seeing that its law applies is apparent - to ensure that an Uruguayan heir or relative of a Uruguayan citizen wrongfully killed may gain compensation for that wrongful death.
>
> . . .
>
> While section 175 (of the "most significant relationship" test) would give Louisiana the initial nod because it is the situs of the injury, Uruguay's interest in seeing that relatives of a deceased Uruguayan citizen recover damages for those wrongful deaths overrides the speculative interest of Louisiana of protecting non-resident tortfeasors."

Indeed, the issue of which law applies is even easier in this case since both the accident occurred in Mexico and the decedents were domiciled in Mexico.

Finally, since the previous courts in this case have held that Mexican law applies, and this ruling was obtained at respondents' request, the respondents are both judicially and collaterally estopped (as to the fact that a prior

determination of applicable law will have res judicata effect, see *Chick Kam Choo v. Exxon* 108. S.Ct. at 1691).

In sum, it is clear that the Fifth Circuit has placed itself as far beyond the holding and intent of *Red Cab* as almost any of the other circuit courts.

C. In Any Event, The Decision In This Case Is In Conflict With Laughlin of The Tenth Circuit, Gaus Of The 9th Circuit, Burns Of The 11th Circuit And Many Other Decisions Of The Circuit And District Courts

In *Laughlin v. K-Mart Corp.*, 50 F. 3d 871 (10th Cir. 1995), an employee brought action in state court against his former employer alleging breach of his employment contract and wrongful termination. The employer removed and the federal district court denied remand. In reversing and ordering remand, the Tenth Circuit held that subject matter jurisdiction did not exist because, while

the petition alleged damages "in excess of $10,000.00", the removal papers simply did not satisfy the heavy burden upon the removing party to show that the "amount in controversy" actually was in excess of the minimum jurisdictional amount (in *Laughlin*, as in this case, the amount of the minimum was $50,000.00, exclusive of costs and interest). The case at bar is even stronger for remand because the petitioners expressly limited the amount of recovery to less than the jurisdictional minimum and, by affidavit, made such commitment irrevocable and in the form of a judicial admission. Yet, in direct conflict with the Tenth Circuit, the Fifth Circuit sustained removal and the Tenth Circuit ordered remand.

The important thing with respect to

Laughlin is that we have been informed that K-Mart, the losing party in Laughlin, will be filing a petition for writ of certiorari by early July and such petition will involve pretty much the same issues as are involved in this case. Such filing will thus present the kind of recent conflict on an important issue as was presented in Chick Kam Choo v. Exxon, 108 S.Ct. 1684 (1988), when writ was granted in that case.

In *Gaus v. Miles, Inc.* 980 Fed 2d 564 (9th Cir. 1992), the plaintiff brought a contract related suit in state court seeking damages in excess of $10,000.00. The defendant removed and the federal district court refused to remand. Referring to the very strong presumption against removal, and noting that federal jurisdiction must be

rejected when there is any doubt about the right of removal, the Ninth Circuit held that the defendant did not provide sufficient proof to justify overcoming the strong presumption against removal where it was unclear has to the amount of damages the plaintiff was actually seeking. Important to this case is the fact that the court in *Gaus* indicated that, if the plaintiff had sought more than the jurisdictional minimum, the defendant would have satisfied its burden but that, if the plaintiff had expressly sought less than the jurisdictional minimum, the plaintiff would have been entitled to remand. Again, as in *Laughlin*, the present case is much stronger with regard to remand and, therefore, the holding by the Fifth Circuit in this case is in conflict with

Gaus, just as it is with *Laughlin*.

In *Burns v. Windsor Insurance Company*, 31 Fed. 3rd 1092 (11th Cir. 1994), the insured brought an action in state court seeking $45,000 in damages from the insurer. The insurer removed and the federal district court denied remand. In its removal papers the insurer asserted that the insured intended to wait one year after remand and then boost her damage claim. There was an indication that the insurer offered to settle for $45,000 (in this case the respondents' true view of this case, as evidenced by their actions, is even worse - they have never offered anything above zero; yet they hypocritically proclaim to the courts that the petitioners' claims are worth millions.)

The court of appeals in *Burns* reversed the district court's denial of remand and ordered the case remanded to state court. The court also countered the somewhat cynical view taken by the Fifth Circuit that affidavits, stipulations and judicial admissions are not sufficient to justify remand. The court in *Burns* stated:

> "Plaintiff's complaint specifically requests $45,000 in damages. Therefore, no jurisdiction exists on the face of plaintiff's claim. So, the critical question is to what extent must defendant prove jurisdiction exists despite plaintiff's express claim to less than the minimum jurisdictional sum?
>
> We believe the defendant's burden of proof must be a heavy one. *C. Boyer*, 913 F.2d at 110-112. Every lawyer is an officer of the court. And, in addition to his duty of diligently researching his client's case, he always has a duty of candor to the tribunal. <u>So, plaintiff's claim, when it is specific and in a pleading signed by a lawyer, deserves deference and a presumption of truth</u>. We will not assume-unless

> given reason to do so-that plaintiff's counsel has falsely represented, or simply does not appreciate, the value of his client's case. Instead, we will assume that plaintiff's counsel best knows the value of his client's case and that counsel is engaging in no deception. We will further presume that plaintiff's counsel understands that, because federal removal jurisdiction is in part determined by the amount of damages a plaintiff seeks, the counsel's choices and representations about damages have important legal consequences and, therefore, raise significant ethical implications for a court officer."

31 Fed. 3d at 1095; emphasis ours. As to the appropriate burdens, the *Burns* court approved *Kliebert*, whereas, as noted above, the court of appeals in this case rejected *Kliebert*.

There is no doubt that *Burns* and the Fifth Circuit in this case are in fatal conflict.

There are many other cases which also conflict with the Fifth Circuit in

this case.[12] See *Iowa C.R. Co. v. Bacon*, 35 S.Ct. 357 (1915) (holding that, where a prayer for recovery was but for $1,990.00, such prayer controlled even though the body of the complaint alleged damages in the amount of $10,000.00, and the case was not removable); *Harley v. Fireman's Fund Insurance Company*, 245 F. 471, 476 (W.D.Wash. 1913) (holding that "the initial pleading" determines the "amount in controversy"; that "the plaintiff may voluntarily and

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[12] And, further contributing to the confusion and conflict among all of the circuits, there are a number of cases that tend to support, at least to some extent, the views of the Fifth Circuit in this case. See e.g. Shaw vs. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993); Matter Shell Oil, supra; Dunn vs. Pepsi Cola Metropolitan Bottling Company, 850 F. Supp. 853 (N.,D. Cal. 1994); Garza, supra.; Angus v. Shiley, Inc. 989 F.2d 142, (3d Cir 1993); and Gafford v. General Electric Company, 997 F. 2d 150 (6th Cir. 1992)

conclusively determine the amount to which his recovery shall be limited"; that "the...cases hold that the plaintiff may waive the excess of federal jurisdiction and sue for a less sum"); *Oder v. Buckeye State Mutual Insurance*, 817 F. Sup. 1413, (S.D. Ind. 1992) (plaintiffs "certified" that "they do not seek a recovery in any amount in excess of $50,000.00"; the court construed the certification as a "covenant" which "binds the plaintiffs"; the court remanded the case to state court); *Brady v. Indemnity Insurance Company*, 68 F.2d 302 (6th Cir. 1933); *Gafford v. General Electric Company*, 997 F. 2d 150 (6th Cir. 1993); *Lane v. Champion International Corp.*, 844 F. Sup. 724, 733 (S.D. Alabama 1994) (in ordering remand, the court noted that "(i)t follows that the

plaintiffs and their counsel represent to this court that upon remand they will never amend the ad damnum clause to increase any claim for damages above the $50,000 jurisdictional amount"); *Cole v. Great Atlantic Tea Company*, 727 F. Supp. 1305 (E.D. Ky. 1990) (the court remanded because of plaintiff's stipulation that her unliquidated damages would not exceed $40,000); *J.W. Petroleum Inc. v. Lange*, 787 F. Sup 975 (D.Kan 1992); *Foster v. State Farm Auto Insurance Co.*, 843 F. Sup. 81 (E.D.N.C.1993) (involving situation where state law did not permit the stating of the amount of the demand in the original filing; the court nevertheless remanded the case on the bases of *Red Cab*); *LockLear v. State Farm Mutual Auto Insurance Co.*, 742 F. Sup 679 (S.D.G.A. 1979); *Tongkook America Inc. v.*

Shipton Sportswear Company, 14 F. 3d 781 (2nd Cir. 1994) (holding that where damages sought are uncertain, doubt as to whether damages exceed minimum for diversity jurisdiction should be resolved in favor of plaintiff's pleading); and *Hicks v. Universal Housing Inc.*, 792 F. Supp. 482, 484 (S.D.W.Va 1992) (remanded case where a suit filed in state court sought damages in the amount of $49,000, even though defendant alleged in its removal papers that the actual amount in controversy far exceeded $50,000).

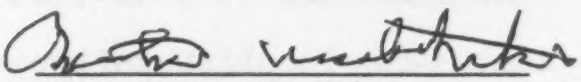
In sum, as we stated in the initial Statement of the Case, the question of the propriety of removal where the amount in controversy is in issue, has generated, unfortunately, the most confusing and conflicting group of decisions from the circuit and district

courts than on any other issue that comes to mind. There is no doubt that these numerous conflicts, some of which are very recent - see *Laughlin* and its conflict with the Fifth Circuit decision in this case - cry out for clarification and reestablishment of uniformity by way of grant of certiorari. Some of the matters that, we respectfully submit, are in dire need of clarification are: whether there are limitations upon the right to remand even though plaintiffs clearly state they are suing for less than the jurisdictional minimum; whether this Court's discussion in Red Cab of "bad faith" and "legal certainty" apply to removal situations as well as to suits originally filed in the federal court; what the burden of proof is with respect to the defendant who removes a case that,

on its face, is for less than the jurisdictional minimum; whether the removing defendants can collaterally attack the clear pleading of plaintiffs and their attorneys that the suit is for less than the jurisdictional amount; if they can collaterally attack such pleadings, as to the question of whether the plaintiffs are bound by their pleadings of a limited amount, which law will apply-federal procedural law, the law of the forum state or the law which has been held to apply to the substantive issues; and, finally, whether the Court literally meant what it said in Red Cab: if a plaintiff pleads expressly that he or she is suing for less than the federal minimum, the case will be remanded even if the true value of the suit is far greater than such minimum.

WHEREFORE PREMISES CONSIDERED, petitioner prays the Court to grant writ of certiorari in this case for the reasons stated above.

Respectfully submitted,



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